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income of a trust was to be used for the maintenance of a family. On the death of the husband the income was to be paid to the wife; and after her death the fund was to be divided into two equal parts and held in trust for the benefit of each of two daughters. It was held that although the trusts for the benefit of the daughters were void, yet the trust for the family purpose was valid. In his opinion, Cardozo, J., stated, "The grantor's purpose is not doubtful. He wished to maintain the family as a unit while he and his wife or either of them lived. During that time there was to be a single trust."

A. M. L.

MORTGAGE OR CONDITIONAL SALE?

In New York, the Court of Appeals has said that, "Courts exist for the purpose of ameliorating the harshness of ancient laws inconsistent with modern progress when it can be done without interfering with vested rights."¹ Was the New York Court of Appeals alive to the real opportunity for amelioration presented to it in the very recent *Youssoupoff* case?

In *Youssoupoff v. Widener*,² the plaintiff, a destitute and exiled Russian prince residing in London delivered to defendant two valuable Rembrandts under a contract giving the plaintiff a right to repurchase within a certain period, provided that "this privilege of repurchase will be exercised only in case he (*Youssoupoff*) finds himself in the position again to keep and personally enjoy these wonderful works of art."

Before the expiration of the stipulated period, plaintiff tendered a sum which he had borrowed and which would make defendant whole. This the defendant refused, on the ground that the right of redemption had been lost since the plaintiff could not fully comply with the terms of the contract.

subordinate in importance and so separable in function that we are at liberty to cut it off, and preserve what goes before."

"What he had in mind was a primary desire that each child at majority should have an equal share of the principal, a fourth of the entire fund, with a secondary desire that if this became impossible, the fourth should go to issue, and in default of issue should be retained, as an accretion to the whole. * * * We carry out his purpose when we treat the four shares of principal as having a several existence in his thought, from the beginning to the vicissitudes of several limitations."

¹ *Supra*, note 14.

² *Oppenheim v. Kreidel*, 236 N. Y. 156, 165; 140 N. E. 227, 230 (1923).

³ *Youssoupoff v. Widener*, 246 N. Y. 174; 158 N. E. 65 (1927).

The plaintiff, in equity, sought to compel the defendant to accept the tender and return the masterpieces. The question resolved itself into this—was the transaction a mortgage, or a conditional sale? The court unanimously decided in favor of the defendant.

At the opposite pole to the holding in the Youssoupoff case, there is found the well reasoned opinion of the United States Supreme Court, in *Russell v. Southard*.³ In that case plaintiff pledged his farm for a sum as against its value that may be reduced to the ratio of 5 to 13. In the instant case the plaintiff pledged his pictures for a sum in proportion to their sale value as 2 is to 3.

In the Youssoupoff case, great stress was laid upon the defendant's alleged intention not to lend any money. Might not equal stress have been laid upon the plaintiff's intent not to divest himself of all interest in the pictures? Plaintiff's position is well expressed at page 67 of his counsel's trial brief, "All the sophistry, dialectics and skill of counsel can never persuade any court that a man who, in financial distress, flatly refused \$585,000 for these pictures in February, 1921, was willing or intended to sell for \$365,000 in July, 1921." Defendant's thought was, apparently, that he would ultimately secure the paintings outright, since the prospects of the plaintiff's securing upwards of £100,000 within a relatively short period appeared extremely remote.

In the *Russell* case, Mr. Justice Curtis said,⁴

"In respect to the written memorandum it was clearly intended to manifest a conditional sale. Very uncommon pains are taken to do this. Indeed, so much anxiety is manifested on this point as to make it apparent that the draftsman considered he had a somewhat difficult task to perform. But it is not to be forgotten that the same language which truly describes a real sale may also be employed to cut off the right of redemption in case of a loan on security; that it is the duty of the court to watch vigilantly these exercises of skill, lest they should be effectual to accomplish what equity forbids, and that in doubtful cases the court leans to the conclusion that the reality was a mortgage and not a sale."

The facts in the *Russell* case as against the facts in the Youssoupoff case, calling for former "*A*" and the latter "*B*," might be summarized as follows:

(1) In the *A* case a deed absolute of a fee simple with a memorandum giving a right to redeem, with no mention of loan or security. In the *B* case a contract with a right to redeem with no mention of loan or security.

³ *Russell v. Southard*, 53 U. S. (12 How.) 139 (1851).

⁴ *Ibid.* 151.

(2) In the *A* case a consideration of \$4,920 for property valued at \$12,960. In the *B* case £100,000 for property worth at least £150,000 not taking into consideration the intrinsic value of the articles as distinguished from mere sale value in the then depressed market.

(3) In the *A* case the mortgagor had four months to redeem, but the Court allowed redemption nineteen years and eight months after the right had, in terms, expired. In the *B* case the plaintiff made adequate tender well within the redemption period but was claimed not to be in a position technically to "enjoy," etc. At most, he was seeking to redeem within three and one-half years of the making of the contract.

(4) In the *A* case the mortgagor throughout the intervening period, in effect, apparently conceded that the transaction was a sale or at least that his right to redeem had been destroyed. In the *B* case the plaintiff never considered the transaction to be, in effect, anything more than a mortgage.

(5) Finally, in the *A* case the rights of several purchasers for value were affected adversely, while in the *B* case no third parties were involved.

In the instant case, the inequitable bargain cannot be dubbed a bad bargain. To dub it bad, it is elementary, will defeat the plaintiff. But admit the plaintiff was a foolish trader, a weak trader, and against these facts, consider that he had the foresight to obtain some memorandum of the transaction. If we remember the words said in 1851 with respect to the consideration to be given memoranda, and that the memorandum here (upon which the Court so much relied) was prepared by the defendant, we can better visualize the situation.

In balancing the equities between the parties, a most important consideration is the distress of the plaintiff at the time of the transaction. It appears that:

(1) He had been compelled to flee his country and had been able to salvage but a fraction of his once extensive fortune;

(2) Almost all his family jewels were in pawn;

(3) A debt of honor of £5,000, sans a note, borrowed from a Russian friend, was overdue;

(4) Plaintiff had assumed the burden of feeding, housing and finding employment for large numbers of Russian refugees;

(5) Plaintiff's bank account was overdrawn;

(6) Plaintiff's dependent relatives were in dire need. His mother had the care of his child in Paris at the time, and was importunate in her demands for money; and,

(7) The day the defendant made the payment of £100,000 to the plaintiff, the plaintiff forwarded to his mother in Paris a check for £22,000.

Bearing in mind these circumstances, consider the view taken in the Russell case:

"It is true Russell must have given his assent to this form of the memorandum; but the distress for money under which he then was, places him in the same condition as other borrowers, in numerous cases reported in the books, who have submitted to the dictation of the lender under the pressure of their wants; and a court of equity does not consider a consent thus obtained to be sufficient to fix the rights of the parties. 'Necessitous men,' says the Lord Chancellor in *Vernon v. Bethell*, 2 Eden, 113, 'are not, truly speaking, free men, but, to answer a present emergency, will submit to any terms that the crafty may impose upon them.'"⁵

It might, in passing, be mentioned that the authority of the Russell case has been uniformly recognized and reiterated.⁶ It might not be unreasonable to add that had the suit been brought in Pennsylvania (defendant's domicil) or Great Britain (where the contract was made), a different result could possibly have been expected.⁷ Then, too, might not the New York decision have been otherwise but for what later appeared to be tactical errors on the part of plaintiff's counsel in the proof of his case? But, nevertheless, with the Supreme Court of our country maintaining a contrary view,⁸ with the equities in behalf of the plaintiff more compelling than those in the Russell case, can it be said that the present decision accords with those high standards of sound and progressive legal development which have been established by the New York Court in its decisions of recent years?

E. M.

LOANING OF SERVANTS.

In a case recently decided by the New York Court of Appeals, there was again presented the question of fixing the responsibility for

⁵ *Ibid.*

⁶ *Whitcomb v. Sutherland*, 18 Ill. 579 (1857); *Fort v. Colby*, 165 Iowa 103, 144 N. W. 393 (1913); *Hull v. Burr*, 58 Fla. 471, 50 So. 754 (1909); *Collins v. Denny Clay Co.*, 41 Wash. 143, 82 Pac. 1012 (1905); *Gibbons v. Joseph Gibbons, C. M. Co.*, 37 Colo. 103, 86 Pac. 94 (1906); *Murray v. Butte-Monitor T. M. Co.*, 41 Mont. 458, 110. Pac. 497 (1910); *Wagg v. Herbert*, 215 U. S. 546, 552 (1910).

⁷ See *Pomeroy's Equity Jurisprudence*, 4th ed., Vol. 3, pp. 1192-1196, and cases there cited.

⁸ *Russell v. Southard*, *supra*, note 3; *Wagg v. Herbert*, *supra*, note 6.